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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HILLIARD and BARBARA
HILLIARD,

Plaintiff/Cross
Defendants/Appellants,

vs.

MURPHY LAND COMPANY, LLC,

Defendants/Cross
Respondent/Respondent.

Case No. 42093-2014

District Case No. CV-13-03004

RESPONDENT'S BRIEF

Appeal from the District Court, Third Judicial District of the State of Idaho, Owyhee County

THE HONORABLE MOLLY J. HUSKEY, DISTRICT JUDGE

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APPELLEE'S RESPONSE BRIEF

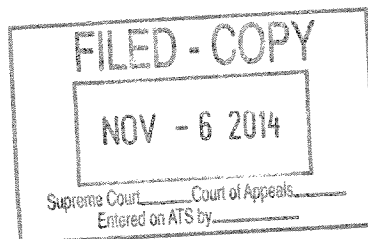


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I.
STATEMENT OF THE CASE

A. Nature of the Case.

James and Barbara Hilliard (“Hilliards”) and Murphy Land Company, LLC (“Murphy Land”) agreed by contract to set aside \$3,000,000 from a purchase price paid by Murphy Land to the Hilliards for real estate. The set aside’s purpose was to account for the “amount of purchaser’s damage, if any, for loss or delay of possession” of the real estate. Although the sale closed on December 30, 2010, Murphy Land did not gain possession of the property until May 2, 2012. When the Hilliards and Murphy Land could not agree on the proper disposition of the \$3,000,000 set aside thereafter, the Hilliards initiated this action against Murphy Land, and Murphy Land countersued.

The case is on appeal before this Court, because Murphy Land prevailed below on its counterclaim against the Hilliards when the District Court granted its Motion for Summary Judgment.

B. Course of Proceedings.

The Hilliards filed their Complaint against Murphy Land on July 18, 2013, seeking a declaratory judgment that the set aside funds should be dispersed to them. R. 10. Murphy Land answered and counterclaimed on August 12, 2013. R. 17. Murphy Land sought a declaration that it was entitled to the set aside.

On September 5, 2013, and in response to the parties’ stipulation for trial setting, the District Court set a trial date for December 2, 2013 and ordered the parties to submit a stipulation to certain scheduling dates within fourteen days from the date of its order. Affidavit of Steven F. Schossberger in Support of Motion to Augment Clerk’s Record on Appeal (“Schossberger

Affidavit”) ¶ 4 (Exhibit A). On September 20, 2013, Murphy Land, due to the Hilliards failure to respond to its proposed Stipulation for Pretrial Scheduling, requested the District Court adopt Murphy Land’s proposed Stipulation to Pretrial Scheduling. Schossberger Affidavit ¶ 5 (Exhibit B). On October 11, 2013, the District Court issued its Order for Scheduling and Planning, which adopted the dates in Murphy Land’s proposed Stipulation for Pretrial Scheduling, including setting the last day for Hilliards “to disclose expert witnesses, together with their opinions and reports” for October 11, 2013 and the “last day for [Murphy Land] to disclose rebuttal experts, together with their opinions and reports” for October 25, 2013. Schossberger Affidavit ¶ 6 (Exhibit C). The Hilliards never moved for relief from this Order.

On October 22, 2013, Murphy Land filed its Motion to Re-Set Trial and Adjust Pretrial Scheduling Dates. Schossberger Affidavit ¶ 7 (Exhibit D). The Motion sought to allow for the “filing and hearing of motions for summary judgment prior to trial.” *Id.* The Hilliards concurred in the Motion, Schossberger Affidavit ¶ 8 (Exhibit E), and on November 12, 2013, the District Court granted the Motion and reset the matter for trial on February 2, 2014. Schossberger Affidavit ¶ 9 (Exhibit F). However, the District Court also noted that “[t]he parties shall otherwise be governed by the terms and requirements set forth in the previous scheduling order ... unless otherwise directed by the Court or stipulated by the parties.” *Id.*

On October 25, 2013, Murphy Land disclosed that it would call Frank Tiegs to give his “expert opinion on his calculations of damages due to the years 2011 - 2012 loss and delay of possession” and attached his CV and a spreadsheet upon which Tiegs’ testimony would be based. Schossberger Affidavit ¶ 10 (Exhibit G). Then, on October 28, 2013, the Hilliards disclosed that Ken Edmunds would be called in response to Murphy Land’s “disclosed intention

to call Mr. Tiegs as an expert.” Schossberger Affidavit ¶ 11 (Exhibit H). However, the Hilliards did not provide Edmunds’ opinion or report.

Murphy Land moved for summary judgment on November 15, 2013, submitted affidavits of Frank Tiegs and Matthew Gordon in support, and noticed a hearing on the motion for December 13, 2014. R. 30. Murphy Land claimed that (1) the unambiguous language of the contract, namely RE-11 Addendum No. 4, clearly provided that Murphy Land was entitled to recover damages for the delayed possession of the real property; and (2) the undisputed evidence demonstrated to a reasonable certainty that its damages exceeded the \$3,000,000 set aside, so it was entitled to the entire amount. R. 309-328.

The Hilliards responded in opposition on November 29, 2014, R. 331, and submitted affidavits of Jay Clark, James C. Hilliard, Ken Edmunds, and Robert F. Bennett in support. R. 352-393. Essentially, the Hilliards claimed there remained disputed material facts, because (1) RE-11 Addendum No. 4 was ambiguous;¹ (2) RE-11 Addendum No. 4 was not supported by consideration; (3) there was mutual mistake as to the meaning of RE-11 Addendum No. 4; (4) Murphy Land’s lost profits were not foreseeable; (5) Murphy Land did not mitigate its damages; and (6) damages were not readily ascertainable.² R. 331-351.

On December 5, 2013, Murphy Land filed two separate motions to strike and noticed a hearing on each for December 13, 2013.³ R. 394, 410. First, it moved to strike Ken Edmund’s

¹ The Hilliards claimed RE-11 Addendum No. 4 was ambiguous, notwithstanding their previous allegation in the Complaint that RE-11 Addendum No. 4 unambiguously dictated that they were entitled to the set apart funds.

² Notably, the Hilliards did not raise the consideration, mutual mistake, or mitigation contentions as affirmative defenses in response to Murphy Land’s counterclaim.

³ Prior to the date of the hearing, the Hilliards did not object to the notice of hearing.

affidavit and portions of Jay Clark's affidavit, because neither Edmunds nor Clark were timely disclosed as expert witnesses, and alternatively because portions of their affidavits lacked foundational support and consisted of hearsay. R. 414-422. Murphy Land's second motion moved to strike portions of Ken Edmunds', Jay Clark's, Robert F. Bennett's, and James C. Hilliard's affidavits. The Motion consisted of a paragraph by paragraph analysis of the affidavits and identified which paragraphs in the affidavits were based on hearsay, made irrelevant assertions, were not supported by the affiant's personal knowledge, or lacked sufficient foundation. R. 397-409.

The next day, Murphy Land filed its Reply Memorandum in Support of Its Motion for Summary Judgment. R. 430.

On December 13, 2013, the District Court held a hearing on Murphy Land's Motions to Strike and Motion for Summary Judgment. At that hearing, counsel for the Hilliards objected, for the first time, to the Court entertaining the Evidentiary Objections, on grounds that such motions had not been served upon the Hilliards fourteen days prior to the date of the hearing. This Court heard argument on the issue, reviewed Idaho Rules of Civil Procedure 7 and 56, and concluded that, because of the time requirements established in Rule 56, it would be illogical to impose Rule 7's 14-day requirement on a motion to strike when the evidence was submitted 14 days prior to hearing. Tr. p. 11, L. 16 - p. 14, L. 9.⁴

Next, the District Court, in an itemized and detailed fashion, reviewed Murphy Land's Motions to Strike. It first found that to the extent the Hilliards offered Edmunds' and Clark's

⁴ The Hilliards have not contested this holding on appeal.

affidavits as expert witnesses, they would be stricken for failure to comply with the District Court's scheduling order requiring disclosure of experts and their opinions and reports by October 11, 2013. Tr. p. 29, L. 10-20, p. 36, L. 11-14. Only Edmonds was disclosed, and only as a rebuttal expert, on October 29, 2013. Further, the Hilliards never provided an expert report or documentation of Edmunds' opinions, as required in the District Court's Scheduling Order. *Id.* Second, the Court found that portions of all four affidavits submitted in support of the Hilliards' Opposition to the Motion for Summary Judgment constituted hearsay, lacked foundational support, were not based on personal knowledge, or were offering legal conclusions. *See* Tr. pp. 29-59. Notably, the Hilliards did not object to, or move to strike, any aspect of Murphy Land's affidavits in support of its Motion for Summary Judgment.

Finally, the District Court reviewed the undisputed evidence and held that (1) the language of the contract, particularly RE-11 Addendum No. 4, is "clear and unambiguous," Tr. p. 110, L. 13-16; (2) that RE-11 Addendum No. 4 clearly provides that the set aside \$3,000,000 is to compensate Murphy Land for the amount of damage it suffered from loss of possession of the real property, Tr. p. 111, L. 1-6; (3) there is no genuine issue that Murphy Land's lost profits resulting from loss of possession were a reasonably foreseeable damage, Tr. p. 115, 3-8; and (4) the Hilliards failed to provide factual support to dispute the bases for damages evidenced in Tiegs' affidavit, which exceeded \$3,000,000, Tr. p. 117-18. Therefore, there was no genuine issue of material fact and Murphy Land was entitled to summary judgment on its claim. Tr. p. 118, L. 8-11.

As a result, the District Court then entered the following Orders on December 19, 2013: (1) an Order granting, in part, Murphy Land's Evidentiary Objections, R. 475; (2) an Order

granting Murphy Land's motion for summary judgment, R. 479; (3) a Judgment awarding the Escrow Funds to Murphy Land, R. 485; and (4) an Order directing the release and disbursement of the Escrow Funds to Murphy Land, R. 482.

The Hilliards moved to alter or amend the judgment on January 2, 2014, and provided a Memorandum in Support of that Motion on January 14, 2014. R. 488, 490. Their principal contentions were: (1) that the district court's ruling on the interaction between Rule 56 and Rule 7 was in error; (2) the \$3,000,000 set aside should be used to first cover their attorney fees; (3) the District Court erred in considering the credibility of Clark in ruling on the Motions to Strike; (4) the District Court improperly weighed the evidence in determining that portions of the affidavits lacked foundational support, consisted of hearsay, were based on legal conclusions, or were without personal knowledge; and (5) the determination that RE-11 Addendum No. 4 was unambiguous was a question of fact, not law. R. 490-512.

Murphy Land responded in opposition, R. 570, and the District Court held a hearing on the Hilliard's Motion on March 14, 2014. It denied the Hilliards' Motion to Alter or Amend Judgment in its entirety. *See* Tr. p. 180-182. The Court thoroughly addressed the Hilliards' evidentiary challenges, noting particularly their failure to challenge any of Murphy Land's evidence, Tr. p. 151-56, the thoroughness of its evidentiary inquiry at the December 2013 hearing, Tr. p. 180-182, that it did not strike Clark's testimony on a credibility basis, Tr. p. 182, L. 13-18, and the fact that arguments not raised prior to the Rule 59 motion were waived, Tr. p. 182, L. 19-25. On March 20, 2014, the Court entered judgment in Murphy Land's favor and dismissed the Hilliards' claims with prejudice. R. 611.

The Hilliards filed a Notice of Appeal on April 23, 2014, R. 614, and an Amended Notice of Appeal on May 17, 2014. R. 620. The Hilliards filed their Opening Brief in this case on October 9, 2014.

On June 17, 2014, the District Court issued an Amended Final Judgment awarding \$65,407.74 in attorney fees and costs to Murphy Land. R. 645. The Hilliards did not file an amended notice of appeal regarding the Amended Final Judgment.

C. Statement of Facts.

Murphy Land generally agrees with the Hilliards' Statement of Facts, subject to the following clarifications or exceptions:

Murphy Land has two members, Frank Tiegs and Lance Funk, who each own 50% of the company. R. 33, ¶ 2.

On November 5, 2010, Murphy Land and the Hilliards executed a purchase and sale agreement for the purchase of Crystal Springs Farm for \$9,500,000 ("Agreement"). R. 34, ¶ 6. Among the express terms of the Agreement was that "Sellers existing lease with Jay Clark to be terminated." The Agreement provided that the sale of Crystal Springs Farm would close on or before December 28, 2010. *Id.*

As the closing date approached, it became apparent that, contrary to James Hilliard's representation, Jay Clark did not intend to vacate Crystal Springs Farm prior to closing. As a result, after extending the closing date, Murphy Land and the Hilliards agreed that \$3,000,000 of the purchase price for Crystal Springs Farm would be held in escrow to compensate Murphy Land for any damages caused by delays in possessing the farm. *Id.* ¶ 7.

On December 29, 2010, Murphy Land and the Hilliards executed the Addendum to memorialize that agreement, and the Hilliards deposited three million dollars into an escrow account at Guaranty Title, Inc. *Id.* After executing the Addendum, the sale of Crystal Springs Farm closed, and the Hilliards transferred fee simple title to the farm to Murphy Land by warranty deed on December 30, 2010. However, Murphy Land did not obtain possession of the property until May 2, 2012. R. 35, ¶ 8.

Murphy Land purchased Crystal Springs Farm with the intention of growing potatoes and other crops thereupon and was ready, willing, and able to take possession on December 30, 2010 and begin preparing the ground for planting. R. 35-36, ¶ 10 & 16.

In 2011, Murphy Land suffered damages, in the form of lost profits, in the amount of approximately \$3,601,791.70 as a result of its inability to gain possession of and farm Crystal Springs Farm that year. R. 37-41, ¶ 19. In 2012, Murphy Land suffered damages, in the form of lost profits, in the amount of approximately \$631,934.64 as a result of its inability to gain possession of Crystal Springs Farm before May 2, 2012. R. 47, ¶20(h). In total, Murphy Land suffered damages, in the form of lost profits, in the amount of approximately \$4,333,726.30 as a result of the delay in possession of the farm from December 30, 2010 through May 2, 2012. R. 47, ¶22.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Murphy Land submits the following re-characterization of the first issue in Hilliards’ Issues Presented on Appeal:

1. Whether any of the District Court’s evidentiary rulings constitute an abuse of discretion, and if so, whether such amount to more than harmless error.

III. ATTORNEY FEES ON APPEAL

Murphy Land seeks its attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and Idaho Code §§ 12-120(3) and 12-121. Murphy Land further notes that the Hilliards' contention that they are entitled to attorney fees and costs under the terms of the purchase agreement, *see* Opening Brief at 11, has been foreclosed by their failure to raise the issue before the District Court. *See* Tr. p. 182, L. 20-24 (“[A]ny arguments that the Hilliards are entitled to deduct their costs from whatever the escrow amount was, was not an issue that was raised at summary judgment, and therefore, that issue and claim has been waived.”); *Mackowiak v. Harris*, 204 P.3d 504, 506 (Idaho 2009).

IV. ARGUMENT

A. Standards of Review.

1. General Summary Judgment Standard.

“When reviewing an order for summary judgment, the standard of review for this Court is the same standard as that used by the district court in ruling on the motion.” *Major v. Sec. Equip. Corp.*, 307 P.3d 1225, 1228 (Idaho 2013). Therefore, “[s]ummary judgment is appropriate if ‘the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Id.* (quoting Idaho R. Civ. Proc. 56(c)). Finally, “[w]hen an action will be tried before a court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed

evidentiary facts.’” *Idaho Dev., LLC v. Teton View Golf Estates, LLC*, 272 P.3d 373, (Idaho 2011) (quoting *Losee v. Idaho Co.*, 220 P.3d 575, 578 (Idaho 2009)).

2. Evidentiary Rulings Prior to Deciding Summary Judgment Motion.

However, prior to ruling on a motion for summary judgment, a trial court must answer the “threshold question” of the “admissibility of the evidence contained in affidavits and depositions in support or in opposition to a motion for summary judgment ... before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial.’” *Gem State Ins. Co. v. Hutchinson*, 175 P.3d 172, 175 (Idaho 2007) (quoting *Carnell v. Barker Mgmt., Inc.*, 48 P.3d 651, 656 (Idaho 2002)). As a result, “Idaho law permits a party to wait until a summary judgment *hearing* to object to the affidavits of the opposing party.” *Id.* at 177 (citing *Hecla Mining Co. v. Star-Morning Mining Co.*, 839 P.2d 1192, 1196-97 (Idaho 1992)).

On appeal, a trial court’s evidentiary rulings are reviewed for an “abuse of discretion.” *Vendelin v. Costco Wholesale Corp.*, 95 P.3d 34, 46 (Idaho 2004).

The abuse of discretion inquiry examines (1) whether the district judge correctly perceived the issue as one of discretion; (2) whether the district judge acted within the outer boundaries of her discretion and consistently with the legal standards applicable to the specific choices available to her; and (3) whether the district judge reached her decision through an exercise of reason.

Id. at 41.

Further, any error in an evidentiary ruling “that does not affect the substantial rights of the parties will be disregarded.” *Id.*; see also *Mulford v. Union Pac. R.R.*, 321 P.3d 684, 690 (Idaho 2014).

3. Waiver.

“‘[I]t is well accepted that issues not argued before the trial court will not be considered when raised for the first time on appeal.’” *Mackowiak*, 204 P.3d at 506 (quoting *Farr v. Mischler*, 923 P.2d 446, 450 (1996)). Likewise, “[i]f either argument or authority is lacking in the parties opening brief, the claim of error is waived.” *Mulford*, 321 P.3d at 690.

B. The District Court Did Not Abuse Its Discretion in Striking Portions of the Affidavits of Ken Edmunds, Jay Clark, James C. Hilliard, and Robert F. Bennett.

The District Court’s analysis of the affidavits submitted by the Hilliards in support of their Opposition to Murphy Land’s Motion for Summary Judgment was not an abuse of discretion. Counsel for the Hilliards has essentially conceded as much, noting that the affidavits were “conclusory” and apologizing to the Court “for the quality of [the] affidavits in response.” *See* Tr. p. 50, L. 5-10; p. 93, L. 12-13.

In this case, the District Court properly identified the appropriate legal standard and employed its discretion in an exercise of reason. *See Vendelin*, 95 P.3d at 41. Indeed, the District Court specifically articulated on the record the standard it was bound to apply when considering affidavits submitted in relation to a motion for summary judgment: “I’m limited to looking at the affidavits that I have in front of me and determining, in and of themselves, whether those affidavits would constitute admissible evidence at trial.” Tr. p. 49-50.⁵

Having established that the District Court understood the correct legal standard, Murphy Land will address each of its rulings, as to each affidavit, in turn.

⁵ The Hilliards’ characterization of this lawful process as improper weighing of the evidence misunderstands the District Court’s role in reviewing a motion for summary judgment and the facts associated therewith.

1. Affidavit of Ken Edmunds.

The District Court did not abuse its discretion when it struck Edmunds’ affidavit in the entirety, because he was not timely disclosed by the Hilliards as an expert witness. The District Court’s alternative bases for striking portions of Edmunds’ affidavit—as hearsay, for lack of personal knowledge, and for lack of foundation—were likewise not an abuse of discretion.

a) The District Court Did Not Abuse Its Discretion in Striking Edmunds Affidavit, Because the Hilliards Did Not Comply with Its Scheduling Order.

This Court’s decision in *Edmunds v. Kraner*, 136 P.3d 338 (Idaho 2006), supports affirming the District Court’s decision to strike Edmunds’ affidavit in its entirety. In *Edmunds*, Plaintiffs timely disclosed their expert witnesses, moved for partial summary judgment, and filed affidavits from their experts in support, all before Defendants had disclosed their expert witnesses. *Id.* at 342. After Defendants disclosed their expert witnesses and filed affidavits in opposition to Plaintiffs’ motion, Plaintiffs withdrew their motion and sought to disclose an additional expert witness despite the time for disclosure having passed. *Id.* The trial court disallowed this expert witness’s testimony, even as a rebuttal expert to Defendants experts. *Id.* at 342, 344. On appeal, this Court found that the trial court did not abuse its discretion in disallowing Plaintiffs’ untimely expert witness’s testimony. *Id.* at 344. Although this Court made it clear that it would not have made the same decision were it in the trial court’s position, it respected the trial court’s discretion. *Id.* Further, this Court emphasized a principle with particular import to the case at hand: “the Rules of Civil Procedure equip both sides with tools to ensure fair pretrial procedure, and we have little sympathy for attorneys who do not utilize these tools to the extent reasonable.” *Id.*

In this case, the Hilliards failed to utilize the Rules of Civil Procedure to the extent reasonable. First, they failed to respond to counsel for Murphy Land's proposed scheduling order. Tr. p. 28, L. 10-13. Second, they failed to disclose their expert witnesses by the October 11, 2013 deadline. Tr. p. 29, L. 4-15. Third, they failed to disclose any experts in response to Murphy Land's discovery request that asked for such information. *See* Tr. p. 23-24. Fourth, they failed to supplement their response to Murphy Land's discovery request. *See* Tr. p. 24-25. Fifth, although they disclosed Edmunds as a rebuttal expert witness on October 28, 2013, the Hilliards did not disclose his opinion or report. *Id.* Finally, Murphy Land's *timely* disclosure of Tiegs as its expert witness was not a "last-minute witness disclosure" that "unreasonably prevent[ed] plaintiffs from responding." *See Edmunds*, 136 P.3d at 344. In summary, it was not an abuse of discretion by the District Court to preclude consideration of Edmunds' affidavit as expert testimony; it was the Hilliards' failure to utilize the Rules of Civil Procedure.⁶

Indeed, the District Court properly recognized it had discretion as to evidentiary matters, applied the correct legal standard, and engaged in an exercise of reason:

The Court sent out an order for pretrial conference on September 5th. The Court also noticed that in that document that it would be sending out a stipulation that the parties had ten days or else the Court would be setting the deadlines.

The Court got a letter from Defendant's attorney in this case indicating that he had done this stipulation, that they'd tried to

⁶ The Hilliards claim that *Edmunds* established that the proper inquiry for evaluating whether or not a trial court's exclusion of expert testimony was appropriate is "whether or not the interests of justice are served." Opening Br. at 13. Murphy Land has reviewed *Edmunds*, set forth its holding above, and respectfully submits that the Hilliards' construction of *Edmunds* is incorrect.

reach you, Mr. Shurtliff. Didn't get a response. So the Court entered an order for purposes of pretrial planning....

Now, that order required that any and all experts be disclosed by the dates given, and that one of the sanctions for them is exclusion of the experts. There's a couple of competing issues at stake here. One of them is that the parties have a complete and fair opportunity to be heard on the merits of their case, all of the parties. And there is another that parties should not be prejudiced by the action or inaction of ... one of the other parties.

[E]xperts were to be disclosed by October 11th for the Plaintiff, and by October 29th for the Defendant.

It appears that the Plaintiff has disclosed a rebuttal expert. They did that on October 29th. But to date there has still been nothing complying with the Court's order to disclose all of the documents that be complied with. The Court is therefore, for failing to comply with the Court's scheduling order, I am going to strike the summary of Mr. Edmunds.

Tr. p. 28-29. This excerpt from the summary judgment hearing transcript demonstrates that the Hilliards did not comply with the District Court's order and that the District Court properly exercised its discretion. Therefore, Edmunds' affidavit was properly excluded on that basis.

This conclusion is bolstered by this Court's recent decision issued in *Zylstra v. State of Idaho*, No. 41421, 2014 Opinion No. 112, 2014 Ida. LEXIS 293 (Idaho October 29, 2014).

There, this Court held that the trial court did not err in striking two of the plaintiff's expert witness affidavits, because the experts "had not been previously disclosed despite written discovery requests and an admonishment from the court regarding the need to fully respond to the same." *Id.* at *5. Indeed, the expert "opinions offered were new and untimely, being submitted after the close of discovery and disclosed for the first time in opposition to a summary judgment motion." *Id.* Tellingly, plaintiff had made "a generalized subject matter disclosure and

a short statement regarding [the] expected testimony” of one expert, but the Court nevertheless struck the expert testimony because the general disclosure “did not contain an actual opinion.” *Id.* at *9. The trial court also took issue with the plaintiff’s failure to supplement its discovery responses. *Id.* at *10. After ruling on the defendants’ motion to strike, the trial court granted summary judgment in favor of defendants.

The facts of this case are remarkably similar to those in *Zylstra*. As already set forth above, the Hilliards have committed as many or more procedural failings as the plaintiff in *Zylstra*. As a result, this Court must likewise hold in this case that “the district court did not err in striking the affidavits of [the Hilliards’] proposed experts.” *Id.* at *15.

b) The District Court Did Not Abuse Its Discretion in Alternatively Striking Portions of Edmunds’ Affidavit as Lacking Foundation and Hearsay.

However, the District Court alternatively held that even had the Hilliards complied with its Order, much of Edmunds’ affidavit constituted inadmissible evidence. *See* Tr. p. 29, L. 18-20.

The material aspects of Edmunds’ affidavit were comprised in an attachment (or summary, as referred to by the District Court). Much of this attachment was struck as lacking foundation and hearsay.

(1) Edmunds’ Affidavit Lacked Foundation.

This Court recently addressed the need for expert testimony to be supported by an adequate foundation. *See Arregui v. Gallegos-Main*, 291 P.3d 1000 (Idaho 2012). There, notwithstanding the trial court’s failure to “articulate its reasoning with specificity, this Court

[was] convinced that the district court analyzed whether [the expert's] affidavit was admissible” due to proper foundation. *Id.* at 1005.

In this case, there is no need to assume that the district court analyzed whether Edmunds’ affidavit was supported by proper foundation. Rather, the District Court clearly articulated in its oral ruling on December 13, 2013, its reasoning in striking portions of Edmunds affidavit as inadmissible for lack of foundation. *See* Tr. p. 30-35. The general problem consisted in Edmunds estimating costs for managing a farm, prices for produce, and amounts of crops produced, without ever providing a basis for where these figures were derived. *See, e.g.*, Tr. p. 31, L. 22-23 (“There is no indication of where that information was derived.”). In so holding, the District Court applied the correct legal standard and exercised its discretion in a reasoned fashion. Therefore, it did not abuse its discretion.

(2) Edmunds’ Affidavit Included Hearsay.

Without an applicable exception, “hearsay is not admissible.” I.R.E. 802. Here, the District Court properly struck portions of Edmunds’ affidavit that were based on an alleged “University of Idaho annual crop analysis,” which was never provided to the Court. *See* Tr. p. 30, L. 5-9 (“The second paragraph, the first sentence will be stricken on the grounds that it’s hearsay. It’s relying upon information from a third source not yet disclosed.”).

Instead of addressing the legal standard and the District Court’s specific findings, the Hilliards simply complain on appeal that in striking portions of Edmunds’ affidavit, the District Court improperly weighed the evidence. *See* Opening Br. at 13-14. This general allegation misconstrues a trial court’s role in evaluating the admissibility of affidavit testimony at the

summary judgment stage and does not provide any basis upon which to conclude that the District Court's exclusion of portions of Edmunds' affidavit as hearsay was an abuse of discretion.

2. Affidavit of Jay Clark.

The District Court properly excluded Clark's affidavit to the extent it was offered as expert testimony, in its entirety. *See* Tr. p. 36, L. 11-17. The District Court also properly excluded in the alternative portions of Clark's affidavit as irrelevant, lacking foundation, and hearsay.

a) The District Court Did Not Abuse Its Discretion in Excluding Clark's Affidavit as Untimely Expert Testimony.

Despite a lengthy discussion at the hearing on the Hilliards' Motion to Alter or Amend Judgment with respect to whether Clark's testimony was offered as expert testimony, *see* Tr. p. 144-47, the Hilliards have not challenged on appeal the District Court's conclusion that Clark's testimony constituted expert testimony, untimely disclosed. *See* Tr. p. 36, L. 11-17. Therefore, any contention to the contrary has been waived. *See Mulford*, 321 P.3d at 690. At this juncture, there is simply no need to engage the Hilliards' in the distraction that has become the District Court's alleged "credibility finding," *see* Opening Br. at 14-15, because the Hilliards have failed to show any abuse of discretion by the District Court in excluding Clark's *entire* affidavit. Indeed, the justifications for excluding Clark's affidavit as expert testimony are even stronger than for excluding Edmunds'. Clark was never disclosed as an expert witness, whether rebuttal or otherwise, and the District Court's decision to take issue with that procedural failing cannot be an abuse of discretion. *See Supra* IV.B.1(a); *Edmunds*, 136 P.3d at 344; *Zylstra*, 2014 Ida. LEXIS 293 at *15.

b) Even If This Court Construes Clark’s Affidavit as Non-Expert Testimony, the District Court Did Not Abuse Its Discretion in Striking Portions of It.

The District Court, in the alternative, also struck portions of Clark’s affidavit largely for lack of foundation, irrelevance, or the presence of hearsay. The Hilliards have not challenged these evidentiary rulings on appeal and have, therefore, waived their ability to challenge them. *See Mulford*, 321 P.3d at 690. Furthermore, the District Court’s detailed, line-by-line analysis of the offending portions of Clark’s affidavit clearly sets forth how Clark’s statements about the property’s farming capacity, estimated production, and market prices on farm products are unsupported by any evidentiary foundation or are irrelevant or constitute hearsay. *See* Tr. p. 36-48. This exercise of reason by the District Court in magnifying its gatekeeping role on the “threshold question” of admissibility of evidence prior to deciding a summary judgment motion, is not an abuse of discretion. The District Court identified the appropriate legal standard, Tr. p. 49-50, and determined whether or not the evidence in the affidavits was admissible. Tr. p. 36-48.

c) The District Court’s Alleged “Credibility Finding” is Harmless Error.

Although the District Court took issue with Clark’s credibility when it compared his affidavit testimony to a prior affidavit on the narrow issue of whether Clark was willing to lease the property to Murphy Land (on the subject of mitigation of damages), *see* Tr. 124-25, any error was harmless.

First, in the summary judgment hearing, the District Court announced its legal conclusion that Murphy Land was not required “to lease the land from the individual who wrongfully chose not to vacate in order to mitigate their losses.” Tr. p. 33-34; p. 116, L. 11-15. The Hilliards’

have not challenged this legal conclusion in their Opening Brief on appeal. As a result, it has been waived. *See Mulford*, 321 P.3d at 690. Further, this waiver renders their challenge to the district court's evidentiary rulings with respect to Clark's testimony, on the basis of an alleged credibility finding, moot. Without a legal basis upon which to base the allegedly improperly stricken testimony of Clark as to the availability of the property for lease from him, that evidence, even if admitted, is irrelevant now.

Second, it does not appear that the District Court struck any portion of Clark's affidavit as a result of a credibility finding. Much of the Hilliards' Opening Brief is devoted to persuading this Court that the District Court weighed credibility and committed error. *See, e.g.*, Opening Br. at 15. However, while the transcript from the December 13, 2013 hearing indicates that Clark's credibility was considered by the District Court, *see* Tr. p. 124-25, it is unclear whether the District Court ever relied on this conclusion in making a decision against the Hilliards. Indeed, the District Court may not have stricken any portion of Clark's affidavit on a credibility basis:

Here is the contradiction in the two. Mr. Tiegs' affidavit says that Mr. Clark's continued presence on the farm prevented Murphy Land from entering it and preparing it for the planting of crops in 2011. [Mr. Clark] is saying that ground had been prepared for the planting of crops.

Now, the Court is going to strike that first part, up until ["the Owyhee Farming Company."] The Court is striking ["contrary to Tiegs' affidavit, ground had been prepared for the planting of crops in 2011."] That's not what [Tiegs'] affidavit says. The affidavit says that Mr. Clark's presence prevented Murphy Land from entering and preparing it. There is no dispute that Murphy Land was prevented from preparing the land in the way Murphy Land wished to do so in 2011.

Therefore, the Court is going to -- the fact that Mr. Clark may have prepared the land does not refute the paragraph 11. So the Court is going to strike that first sentence.

Tr. p. 40, L. 3-24. The entirety of the language stricken from Clark's affidavit on the basis indicated in the above excerpt is: "Contrary to Tiegs affidavit paragraph 11, ground had been prepared for the planting of crops in 2011...." Every other aspect of Clark's affidavit that was stricken was clearly stricken for lack of foundation, lack of personal knowledge, or hearsay, *see* Tr. p. 36-48, bases which the Hilliards have not challenged on appeal. Further, a clear reading of the District Court's ruling supports the conclusion that this one phrase was stricken, not on the basis of credibility, but because it misconstrued a line from Tiegs' affidavit. The District Court said as much at the hearing on the Motion to Alter or Amend Judgment: "[T]he Court does not recollect that it struck that portion of the affidavit based on lack of credibility.... [I]ts reason for striking that portion of the affidavit was based on the earlier grounds." Tr. p. 182, L. 11-13; *see also* Tr. p. 148, L. 14-18. Therefore, any error was harmless.

Finally, this Court's decision in *Major v. Sec. Equip. Corp.*, 307 P.3d 1225 (Idaho 2013), may also be relevant to the alleged credibility finding here. In *Major*, this Court explained that the sham affidavit doctrine—which permits a trial court at the summary judgment stage to compare an affiant's statements to prior testimony and exclude the affidavit if inconsistent with prior testimony—is inconsistent with the procedural posture of a summary judgment motion. *Id.* at 1232. Nevertheless, this Court held that a trial court that applied the doctrine in excluding an affidavit at the summary judgment stage "did not err in striking the affidavit" inasmuch as "the district court was following precedent from the Court of Appeals," which had adopted the doctrine. *Id.* at 1231. Ultimately, this Court still found that the trial court had abused its discretion when it applied the doctrine, because the prior testimony did not conflict with the

statements in the stricken affidavit. *Id.* at 1232-33. However, the import of insulating a trial court's decision that follows Court of Appeals precedent is noteworthy.

This Court filed its decision in *Major* on August 27, 2013. 307 P.3d 1225. The District Court held the summary judgment hearing on December 13, 2013. While Murphy Land recognizes that the hearing was conducted after this Court issued *Major*, the District Court's statement about its authority to make a credibility finding in light of a sham affidavit may well have been based off its understanding of the sham affidavit doctrine under Idaho Court of Appeals precedent. As a result, a credibility finding, in any, on this basis alone, might not be error. Further, unlike the Court in *Major*, the District Court here did not improperly interpret the conflicting testimony in the affidavits, so there would not be an alternative basis upon which to conclude there was an abuse of discretion.

Nevertheless, the impact of *Major* on this case need not be decided given (1) Clark's affidavit was stricken in its entirety due to the Hilliards' failure to comply with the District Court's scheduling order; (2) the Hilliards have not challenged the District Court's conclusion as a matter of law that Murphy Land was not required to mitigate its damages by leasing land from Clark, an unlawful possessor of its property; and (3) the District Court may not have actually stricken any testimony on the basis of Clark's credibility. Therefore, any error committed by the District Court in this respect was harmless.

3. Affidavit of James C. Hilliard.

The District Court did not abuse its discretion when it struck portions of Hilliard's affidavit that were offered as legal conclusions or based on hearsay. *See* Tr. p. 56-59. The

Hilliards have not addressed these findings in their Opening Brief on appeal. Therefore, they have waived any challenge thereto. *See Mulford*, 321 P.3d at 690.

Further, even had they not waived their ability to challenge these findings, there was no abuse of discretion. The District Court is not bound to give weight to any legal conclusions in an affiant's testimony. *See* I.R.E. 701. Further, the Hilliards have proffered no exception to the general rule against hearsay that would warrant admitting the hearsay statement struck from Hilliard's affidavit. *See* I.R.E. 802. Therefore, the District Court's decision to strike portions of Hilliard's affidavit was not an abuse of discretion.

4. Affidavit of Robert F. Bennett.

Likewise, the District Court did not abuse its discretion when it struck portions of Bennett's affidavit that lacked proper foundation or consisted of hearsay. *See* Tr. p. 51-55. Indeed, as is the case with most of the District Court's specific evidentiary findings, the Hilliards have not addressed these findings in their Opening Brief on appeal. Therefore, they have waived any challenge thereto. *See Mulford*, 321 P.3d at 690.

Furthermore, even had the Hilliards not waived their ability to challenge these findings, the District Court did not abuse its discretion in striking portions of Bennett's affidavit. The stricken portions were largely based on alleged conversations with other people that are clearly hearsay, and the Hilliards have not provided an exception that applies to any such statement. Therefore, the District Court properly exercised its discretion in striking those statements. *See* I.R.E. 802. The other stricken portions lacked evidentiary foundation, and the District Court's detailed analysis clearly shows that Bennett's affidavit failed to demonstrate the basis for his

knowledge as to those statements. *See* Tr. p. 51-55. As a result, there was no abuse of discretion.

5. The District Court was Not Required to *Sua Sponte* Challenge the Admissibility of the Affidavit of Frank Tiegs.

The District Court did not abuse its discretion by declining to make the Hilliards' arguments for them *sua sponte* as to the admissibility of Tiegs' affidavit.

This Court has made clear that evidence admitted without objection or a motion to strike is “‘as strong as any other legally competent evidence.’” *Phillips v. Erhart*, 254 P.3d 1, 6 (Idaho 2011) (quoting 29A Am. Jur. 2d Evidence § 1367 (2008)). Indeed, evidence admitted without objection cannot be given less weight by the district court at the summary judgment stage; that would amount to weighing the evidence. *See id.* at 7. As a result, what a trial court would have done had there been an objection or motion to strike is “irrelevant.” *Id.*

The District Court discussed this very issue with counsel for Hilliards at the hearing on their Motion to Alter or Amend Judgment:

THE COURT: [T]here wasn't an objection.

MR. SHURTLIFF: Well, but that -- I don't think that avoids the need for a Court, before it awards \$3 million, to be somewhat satisfied as to the bona fides of what it's about.

THE COURT: Well, don't you think that's the Court inserting itself on behalf of one of the parties to make a determination one way or the other? I mean, okay, so you're suggesting that on behalf of your client I should have gone in and done something *sua sponte*. Would you be as enthusiastic about that approach if I had done that on behalf of Murphy Land?

Tr. p. 153-54; *see generally* Tr. p. 148-56.

On appeal, the Hilliards attempt to excuse their failure to object to or move to strike the affidavit of Tiegs—which is the undisputed basis for the amount of Murphy Land’s claim to the set aside funds—by contending that they were treated unfairly. Indeed, they claim that the Court “held all of Hilliards’ witnesses to a higher standard than it held Tiegs and other Murphy witnesses.” Opening Br. at 14. However, the only reason one would get this vibe from reviewing the District Court’s oral rulings is due to the fact that *the Hilliards* did not subject Murphy Land’s affidavit to the District Court’s scrutiny. It is completely of their own doing. To try to make up for this failure at such a late stage of the proceeding is improper. The District Court in no way abused its discretion by declining to *sua sponte* challenge Murphy Land’s evidence when the Hilliards did not do so.

The Hilliard’s also claim that Tiegs’ affidavit was impermissibly employed by the District Court as a yardstick to measure the admissibility of their affidavits. *See* Opening Br. at 14 (citing *Nield v. Pocatello Health Servs.*, 332 P.3d 714 (Idaho 2014)). However, this claim is baseless.

What this Court was concerned with in *Nield* was a trial court’s use of one expert witness’s affidavit to determine whether another expert witness’s affidavit satisfied I.R.E. 702’s admissibility requirements. 332 P.3d at 727-28. In essence, this Court held that “there is no requirement that an expert’s testimony must comply with any standard set out in another expert’s testimony.” *Id.* at 728.

In the case at hand, the District Court did not have any expert testimony with which to compare to Tiegs’ expert testimony, because the Hilliards failed to comply with the District Court’s Scheduling Order. Both Edmunds’ and Clark’s affidavits were stricken to the extent

they were offered as expert testimony. Tr. p. 29, L. 15-17; p. 36, L. 11-14. Therefore, admissibility was not based on whether or not the Hilliards' expert testimony addressed each and every contention in Tiegs' affidavit, because the Hilliards did not have any expert testimony. Further, the Court's use of Tiegs' affidavit in reviewing the admissibility of assertions in the Hilliards affidavits was always in the Hilliards' favor. Although the Hilliards did not provide sufficient evidentiary foundation for most of their concededly "conclusory" affidavits, *see* Tr. p. 50, L. 10, the portions that were based on evidence from Tiegs' affidavit were *not* stricken. *See, e.g.*, Tr. p. 29-30. Only the portions of the affidavits that lacked evidentiary foundation, included hearsay, were not based on personal knowledge, or consisted of legal conclusions, were deemed inadmissible. These latter conclusions were not in any way based on Tiegs' affidavit. As a result, the procedural posture of this case paints a picture very different from that in *Nield*.

C. The District Court Did Not Fail to Construe Disputed Facts in Favor of the Hilliards, Because There Were No Material Issues of Disputed Fact.

The Hilliards' contention that the District Court misunderstood the appropriate standard of review at the summary judgment stage is without merit.

As articulated above, a trial court may, "[w]hen an action will be tried before a court without a jury, ... in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts." *Idaho Dev., LLC v. Teton View Golf Estates, LLC*, 272 P.3d 373, (Idaho 2011) (quoting *Losee v. Idaho Co.*, 220 P.3d 575, 578 (Idaho 2009)).

The Hilliards claim that the District Court did not abide by this standard, because it allegedly assessed the credibility of Clark. *See* Opening Br. at 17. However, this is essentially a repackaging of the argument already addressed above. *See supra* IV.B.2(c). To the extent it is raising a separate challenge to inferences allegedly drawn by the District Court in ruling on the

Motion for Summary Judgment, it is inapposite. Here, because of the Hilliards failure to provide *admissible* evidence rebutting that submitted by Murphy Land, *see* Tr. p. 93, L. 12-13 (Counsel for the Hilliards: “I apologize for the quality of our affidavits in response.”), there were no material facts in dispute. Tr. p. 117-18 (“[T]here is simply nothing that disputes the conclusions that Mr. Tiegs has come to.”). Although the Hilliards attempt to create a factual dispute as to the issue of damages suffered by Murphy Land by stating that such a determination is usually for the finder of fact, *see* Opening Br. at 18, they cannot overcome the fact that they provided no admissible evidence to rebut the evidence of damages submitted by Murphy Land. *See Zylstra*, 2014 Ida. LEXIS 293 at *11 (“Without an expert opinion rebutting the opinion of BSU’s expert on the element of causation, the district court found in favor of BSU on summary judgment.”).

As a result, the District Court did not make any inferences on *disputed* facts. *See* Tr. p. 118, L. 8-11 (“[T]he Court finds that there is no genuine issue of material fact in this case.”). In sum, the District Court understood the standard it was to apply when ruling on a motion for summary judgment, and it complied with that standard. *See* Tr. p. 106, L. 19-22 (“I think the standards for summary judgment are well known by the parties. I’ll put them on the record just in case.”).

D. The District Court’s Decision was Properly Set Forth in Its Oral Ruling and Orders.

The Hilliards’ challenge to the sufficiency of the factual findings and conclusions of law in the District Court’s decision granting Murphy Land’s Motion for Summary Judgment is off base. Indeed, “[l]ogically, findings of fact should not be made in disposing of motions for summary judgment. In granting a motion for summary judgment, ... the court merely rules that

there are no material issues of fact and decides questions of law.” *Stewart v. Hood Corp.*, 506 P.2d 95 (Idaho 1973) (internal quotation marks omitted).

As indicated in the Hilliards’ Opening Brief, however, the Idaho Court of Appeals has held that when a trial court exercises the *Ritchie* power, it must “make findings to identify the inferences drawn ... and to identify the evidentiary facts upon which his decision is based.” *Blackmon v. Zufelt*, 700 P.2d 91, 93 (Idaho Ct. App. 1985). As discussed in the *supra* IV.C, the record makes clear that the District Court did not make any inferences from the undisputed facts. The Hilliards simply failed to provide admissible evidence to rebut Murphy Land’s evidence. Therefore, the requirement articulated in *Blackmon* is not applicable. However, even if it were applicable, the District Court complied with it.

In the December 19, 2013 Order granting Murphy Land’s Motion for Summary Judgment, the District Court incorporated its oral ruling at the December 13, 2013 hearing by reference. The transcript of that hearing demonstrates that the District Court applied the correct legal standard, set forth the undisputed material facts, and made conclusions of law. *See, e.g.*, Tr. p. 107, L. 23-24 (“The facts the Court is finding is [sic] as follows:”); p. 110, L. 13-14 (“The Court finds that the language of [the contract] is clear and unambiguous.”); p. 116, L. 6-10 (“But in order to defeat the motion for summary judgment, the Hilliards had to allege specific facts that would raise a genuine issue of material fact about the factual basis and the conclusions of Mr. Tiegs about damages.”); p. 117-18 (“In terms of the amount of damages, initially there is a question of fact about those amount of damages, but Plaintiffs have failed to sufficiently refute the amount of damages alleged. Because based on the lack of factual support for the affidavits, there simply is nothing that disputes the conclusions that Mr. Tiegs has come to.”). The District

Court properly set forth the undisputed facts and legal conclusions upon which it relied in granting Murphy Land's Motion for Summary Judgment.

E. Murphy Land is Entitled to Recover Its Attorney Fees and Costs on Appeal.

Murphy Land is entitled to recover its attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and Idaho Code §§ 12-120(3) and 12-121.

Idaho Code § 12-120(3) provides that “[i]n any civil action to recover ... in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.” Further, “[t]he term ‘commercial transaction’ is defined to mean all transactions except transactions for personal or household purposes.” *Id.*

In its Order on Costs and Attorney Fees, R. 634, the District Court found that Murphy Land was entitled to attorney fees and costs below, because it was the prevailing party and the transaction implicated was a commercial transaction that constituted the “gravamen of the lawsuit.” *See* R. 637 (citing *Buku Properties, LLC v. Clark*, 291 P.3d 1027 (Idaho 2012)). This reasoning applies equally on appeal. Indeed, (1) the commercial transaction between the Hilliards and Murphy Land involving the sale of real property “is integral” to Murphy Land’s claim; and (2) that same transaction is “the basis upon which recovery is sought.” *See Buku Properties*, 291 P.3d at 1035. As a result, Murphy Land is entitled to recover its attorney fees and costs pursuant to I.C. § 12-120(3).

As for I.C. § 12-121 providing a basis for recovering attorney fees, in *Idaho Military Historical Society, Inc., v. Holbrook*, 329 P.3d 1072 (2014), this Court clarified the relevant standard as follows:

. . . When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. §12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. The award of attorney fees rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion. . . .

Id. at 1079 (internal quotation marks omitted). As has been clearly set forth above, there is simply no triable issue of fact that has been raised by the Hilliards on appeal; their claims are indeed without foundation. Therefore, Murphy Land is also entitled to recover its attorney fees and costs under I.C. § 12-121.

V. CONCLUSION

Murphy Land respectfully requests that the District Court's grant of Summary Judgment in its favor be affirmed.

DATED THIS 6th day of November, 2014.

HAWLEY TROXELL ENNIS & HAWLEY LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2014, I caused to be served a true copy of the foregoing APPELLEE'S RESPONSE BRIEF by the method indicated below, and addressed to each of the following:

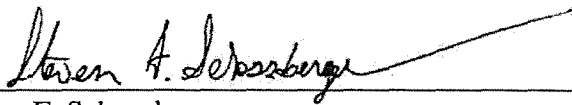
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